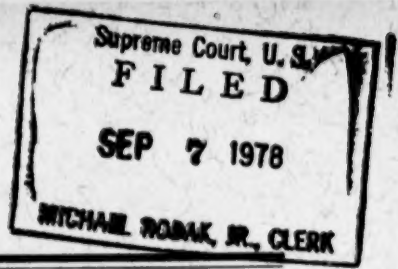


No. 78-97



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**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

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**SEARS, ROEBUCK AND CO., PETITIONER**

**v.**

**CHARLES W. DAHM, ETC., ET AL.**

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***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SEVENTH CIRCUIT***

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**MEMORANDUM FOR THE  
FEDERAL RESPONDENTS**

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**WADE H. MCCREE, JR.,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.***

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1. As a government contractor, petitioner is required to comply with the federal equal employment opportunity policies set forth in Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303. Department of Labor regulations promulgated under the authority of the Executive Order require that petitioner prepare and submit to the General Services Administration certain materials documenting its equal employment activities and goals.<sup>1</sup> Among the documents petitioner is required to prepare are Affirmative Action Programs for each of its domestic establishments. 41 C.F.R. Part 60 (1976).

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<sup>1</sup>The Executive Order provides that the Secretary of Labor is to enforce the terms of the Order. The Secretary has delegated the enforcement authority to the Office of Federal Contract Compliance Programs (OFCCP). 41 C.F.R. 60-1.2 (1976). The OFCCP in turn has

In early 1976 GSA informed petitioner that a request had been made for copies of petitioner's 1974 Affirmative Action Programs for its corporate headquarters in Chicago. Petitioner objected to any disclosure of the materials. GSA overruled the objections, however, and the decision to disclose was upheld by the Director of the OFCCP (Pet. App. A4-A5).

Petitioner then filed suit in the United States District Court for the Northern District of Illinois; it asked the court to block the release of the materials, alleging that the materials contain confidential business information and that their release would violate the Trade Secrets Act, 18 U.S.C. 1905.<sup>2</sup> Petitioner further argued that the materials are exempt from mandatory disclosure under Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3).

The district court entered a preliminary injunction barring the release of the materials (Pet. App. A16-A22). The court held that the materials contain confidential statistical data and that the release of those materials would violate the Trade Secrets Act (Pet. App. A21).<sup>3</sup>

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designated various agencies as "compliance agencies" to monitor the equal employment activities of different government contractors. 41 C.F.R. 60-1.6. GSA serves as petitioner's compliance agency.

<sup>2</sup>Petitioner also relied on various other statutes, including Section 709(e) of the Civil Rights Act of 1964, 78 Stat. 262, 42 U.S.C. 2000e-8(e), and Exemptions 4, 6, and 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), (6) and (7) (Pet. App. A5). Petitioner did not press these points on appeal and does not rely on them here.

<sup>3</sup>In the course of holding that the proposed disclosure would violate the Trade Secrets Act, the court held that the materials are exempt from disclosure under Exemption 3 of the Freedom of Information Act (Pet. App. A21).

The court of appeals vacated the injunction and ordered that the complaint be dismissed (Pet. App. A1-A15). The court first held that disclosure of the materials is not forbidden by the Trade Secrets Act, because that Act prohibits only disclosures "not authorized by law." The OFCCP regulations permitting discretionary disclosure of Affirmative Action Programs, the court held, provide legal authorization sufficient to exempt the proposed disclosures from the prohibition of the Trade Secrets Act (Pet. App. A6-A11). The court further held that, even if the Trade Secrets Act forbids disclosure, neither that statute nor the Freedom of Information Act (FOIA) provides a basis for private injunctive relief against disclosure. Neither statute, the Court held, was intended to create a private right of action on behalf of submitters of information; instead, judicial review of agency decisions to disclose assertedly confidential information must be conducted on the administrative record, subject to the standards of review established in the Administrative Procedure Act, 5 U.S.C. 706.

2. Petitioner argues that the proposed disclosures are prohibited by the Trade Secrets Act.<sup>4</sup> As petitioner recognizes (Pet. 6), this issue is before the Court in a closely analogous context in *Chrysler Corp. v. Brown*, No. 77-922, certiorari granted, March 6, 1978. Both cases involve requests for a government contractor's Affirmative Action Programs, and both raise the question of the applicability of the Trade Secrets Act to disclosures authorized by OFCCP regulations.

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<sup>4</sup>The three questions presented in the petition all involve closely related issues bearing on whether the Trade Secrets Act prohibits disclosures of the sort at issue in this case.

It is therefore respectfully submitted that the Court should hold this petition for disposition in light of its decision in *Chrysler Corp. v. Brown*.

WADE H. MCCREE, JR.,  
*Solicitor General.*

SEPTEMBER 1978.